IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,	)	
Plaintiff,	)	
v.	)	Civil Action No. 00-2041
PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, CHARLES von BERNUTH and JOHN HERKLOTZ,	)	
Defendants.	)	

MEMORANDUM

I

Before the Court is the motion of plaintiff, WRS, Inc. ("WRS"), to reopen the above-captioned civil action. For the reasons set forth below, the motion will be granted.

II

The protracted procedural history of this case may be summarized as follows:

On October 13, 2000, Thomas E. Reilly, Esquire filed this diversity action on behalf of WRS against defendants, Plaza Entertainment, Inc. ("Plaza"), Eric Parkinson ("Parkinson"), Charles von Bernuth ("von Bernuth") and John Herklotz ("Herklotz"). The complaint alleges that Plaza failed to pay WRS in accordance with the terms of a contract pursuant to which WRS duplicated film and video titles for Plaza, and that Parkinson, von Bernuth and Herklotz also are liable for the monies owed to

WRS by Plaza based on their execution of personal guaranties of Plaza's obligations to WRS for the duplication services. Between December 8, 2000 and May 25, 2001, each defendant filed an answer to WRS's complaint. In addition, Plaza filed a counterclaim against WRS.

On August 24, 2001, WRS commenced a voluntary Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Western District of Pennsylvania (Case No. 01-28759). Thereafter, on December 13, 2001, Attorney Reilly filed a motion for leave to withdraw as counsel for WRS based on the failure of the Bankruptcy Court to approve his continued representation of WRS in this action.[1] Two case management conferences were held in connection with Attorney Reilly's motion for leave to withdraw as WRS's counsel - the first conference was held on January 8, 2002 and the second conference was held on February 13, 2002.

Following the case management conference on February 13, 2002 and based on the Bankruptcy Court's failure to approve Attorney Reilly's continued representation of WRS in this action, the Court granted Attorney Reilly's motion for leave to withdraw as counsel for WRS and signed the order attached to the motion on February 14, 2002. In addition, the Court entered the following order on February 14, 2002:

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[1]Under 11 U.S.C. § 327, a Chapter 11 debtor must have court approval to hire professionals, including attorneys.

ORDER

AND NOW, this 14th day of February, 2002, it is hereby ORDERED as follows:

1. Plaintiff WRS, Inc., d/b/a WRS Motion Picture Laboratories, is in bankruptcy and is not represented by counsel in the above-captioned action. It appears that no further action may be taken by the court at this time. The Clerk shall accordingly mark the above-captioned case closed. Nothing contained in this order shall be considered a dismissal or disposition of this action, and should further proceedings therein become necessary or desirable, any party may initiate the same in the same manner as if this order had not been entered.

2. In the event that counsel does not enter an appearance for plaintiff on or before March 15, 2002, the above-captioned action will be dismissed without prejudice.

William L. Standish
United States District Judge

After receiving permission to withdraw as WRS's counsel in this case, Attorney Reilly filed a Praecipe to Withdraw Appearance, which was signed by the Court on February 28, 2002.

No appearance of counsel was entered on behalf of WRS before March 15, 2002, and no further action was taken in this case until August 20, 2003, when Attorney Reilly filed the motion to reopen the case which is presently under consideration. In the motion, Attorney Reilly indicates that, on July 25, 2003, he filed an application in the Bankruptcy Court to be appointed special counsel for WRS to pursue this action (as well as other actions to collect accounts receivable owed to WRS), and Attorney Reilly requested the Court to vacate its February 14, 2002 order dismissing the case based on WRS's desire to prosecute this action.

On September 9, 2003, Herklotz filed a response to WRS's motion to reopen the case, arguing that the motion should be denied due to the expiration of the statute of limitations. On September 12, 2003, Fred W. Freitag, IV, Esquire filed a motion to withdraw the appearance he had entered on behalf of Plaza and Parkinson based on their failure to respond to the copy of the motion to reopen the case which Attorney Freitag had forwarded to them, as well as their failure to provide Attorney Freitag with a retainer fee as requested.[2]

On September 15, 2003, the Court entered a memorandum order denying WRS's motion to reopen the case based on the Court's belief that the case had been dismissed due to the failure of counsel to enter an appearance on WRS's behalf by March 15, 2002 in accordance with the second paragraph of the Court's February 14, 2002 order. The Court's memorandum order indicated that WRS would have to file a new action against defendants if it wished to pursue the claims that had been asserted in the October 13, 2000 complaint filed in this action. In light of the denial of WRS's motion to reopen the case, the Court entered a second order on September 15, 2003, dismissing

[2]The Court did not receive a response to WRS's motion to reopen the case from von Bernuth.

Attorney Freitag's motion to withdraw his appearance on behalf of Plaza and Parkinson as moot.

On September 22, 2003, WRS filed a motion for reconsideration of the Court's September 15, 2003 memorandum order denying its motion to reopen the case. On the same day, WRS filed a new action against defendants in this Court asserting the same claims that were asserted against defendants in this case. The new action was docketed at Civil Action No. 03-1398. On September 23, 2003, the Court denied WRS's motion for reconsideration of the September 15, 2003 memorandum order, and WRS filed a timely appeal to the United States Court of Appeals for the Third Circuit from the denial.

On April 4, 2005, the Third Circuit filed an opinion dismissing WRS's appeal for lack of jurisdiction. The Third Circuit noted that the parties and this Court were proceeding on the assumption that this action had been dismissed pursuant to the Court's February 14, 2002 order based on the failure of counsel to enter an appearance on WRS's behalf by March 15, 2002. The Third Circuit further noted that, although this assumption was not unreasonable, it was erroneous because a separate order dismissing the case was required. Based on the Court's failure to enter a separate order, the Third Circuit concluded that this action simply had been administratively closed and that this Court had retained jurisdiction. Due to the lack of a final order, the Third Circuit concluded that it lacked jurisdiction to hear WRS's appeal, and the matter was remanded to this Court for further consideration of WRS's motion to reopen the case.

On May 23, 2005, a conference among counsel and the Court was held to discuss the Third Circuit's decision, and a briefing schedule was entered. Specifically, by order dated May 23, 2005, WRS was directed to file a brief in support of its motion to reopen the case on or before June 13, 2005, and Plaza, Parkinson and von Bernuth were given the opportunity to file a brief in opposition, and Herklotz was given the opportunity to file a supplemental brief in opposition, to WRS's motion on or before July 8, 2005. WRS filed its brief in support of the motion to reopen the case on June 13, 2005. However, Plaza, Parkinson and von Bernuth have not filed a brief in opposition, and Herklotz has not filed a supplemental brief in opposition.

III

The apparently undisputed circumstances surrounding Attorney Reilly's December 13, 2001 motion for leave to withdraw his appearance for WRS in this action and his August 20, 2003 motion to reopen the case are set forth in WRS's brief in support of the motion to reopen the case and may be summarized as follows:

In July, 2001, the National Bank of Canada ("NBOC"), a secured creditor of WRS, instituted an involuntary receivership proceeding against WRS. Shortly thereafter, on August 24, 2001, WRS commenced its voluntary Chapter 11 bankruptcy proceeding. During the first few months of WRS's bankruptcy proceeding, Attorney Reilly and WRS's bankruptcy counsel discussed Attorney Reilly's continued representation of WRS in this and other actions to recover accounts receivable. However, because WRS's accounts receivable, including the account receivable from Plaza which is the subject of this action, were subject to the security interest of NBOC, Attorney Reilly was unwilling to continue his representation of WRS in this case on a contingent fee basis as apparently proposed by WRS's bankruptcy counsel. As a result, on December 13, 2001, Attorney Reilly filed the motion for leave to withdraw his appearance as counsel for WRS in this action.

Between February 14, 2002, when the Court entered the order administratively closing this case due to the filing of WRS's bankruptcy petition, and August 20, 2003, when Attorney Reilly filed the motion to reopen this case, WRS engaged in negotiations with NBOC and its successor, PNC Bank, regarding a waiver of their rights in certain accounts receivable of WRS, including the account receivable from Plaza that is the subject of this action. Ultimately, PNC Bank agreed to waive its right to certain accounts receivable, including the Plaza account receivable, thus giving WRS the right to the proceeds of any recovery in this action and the ability to offer a contingent fee arrangement to Attorney Reilly if the Bankruptcy Court approved the proposed settlement agreement between WRS and PNC Bank. On this basis, WRS and Attorney Reilly entered into a retention agreement, and WRS moved in the Bankruptcy Court to retain Attorney Reilly as special counsel to represent it in this case. In anticipation of the Bankruptcy Court's approval of the motion, Attorney Reilly filed the motion to reopen this case on August 20, 2003.

IV

After consideration, the Court concludes that WRS's motion to reopen this case will be granted. As set forth above, the delay in the entry of Attorney Reilly's appearance on behalf of WRS following the Court's February 14, 2002 order was due to issues that arose between WRS and its secured creditor, NBOC, which was succeeded by PNC Bank, regarding who was entitled to prosecute actions to recover WRS's accounts receivable and who would benefit from any recoveries, and the Court was unaware of these issues and the ongoing negotiations relating thereto. Once these issues were resolved, WRS acted promptly to retain Attorney Reilly and moved to reopen this case. Moreover, WRS would be prejudiced by the Court's refusal to grant the motion to reopen this case because defendants have raised the defense of the statute of limitations in the subsequent action filed by WRS at Civil Action No. 03-1398. Finally, in light of the ambiguity in the Court's February 14, 2002 order, which was noted by the Third Circuit in its April 4, 2005 opinion, the Court concludes that it would be fundamentally unfair to deny WRS's motion to reopen this case.

An order follows.